

I. Introduction

The Mayor's Group Homes Task Force (Task Force) was asked by Mayor Coleen Seng to examine the City's laws and regulations governing group homes and congregate housing. The task, derived from a Comprehensive Plan requirement and outlined by the Mayor, is to balance the objective of providing effective and efficient services to the City's special populations while protecting the integrity and stability of Lincoln's residential neighborhoods. The Task Force held its first meeting on June 29, 2004, and was asked to complete its work within four months.

The Lincoln/Lancaster County Comprehensive Plan charges the City to "revise the congregate living facility codes in order to provide housing opportunities for residents with special needs throughout the city that are compatible with residential neighborhoods." The Comprehensive Plan goes on to state congregate facilities should be designed and located to enhance the surrounding neighborhood. Reasonable spacing, design, and operational requirements should be created for all congregate facilities to preserve the neighborhood character while providing for those with special needs.

The City of Lincoln regulates group homes and other congregate living arrangements through several ordinances. The Task Force was asked to focus on the zoning ordinance and recommend any changes necessary to improve the City's ability to provide appropriate housing opportunities for people with special needs. However, any recommended changes also should be compatible with Lincoln's existing neighborhoods.

II. Jurisdiction

The City of Lincoln, through its charter, is empowered to enact zoning ordinances to regulate and restrict the location, height, bulk, and size of buildings and other structures; the density of population; and the locations and uses of buildings, structures, and land for trade, industry, business, residences, and other purposes. These regulations are grounded in the City's police powers, and based upon the promotion of the health, safety, morals, or general welfare of the city. Zoning regulations include consideration of such interests as the character of the various parts of the area and the peculiar suitability of particular uses and types of development, conservation of property values, and encouraging the most appropriate uses of land.

In addition to the fundamental limitations on the exercise of police powers, there also may be federal statutory requirements or case law that further addresses local land use controls. Specifically, the regulation of residential land uses as applied to persons with disabilities is addressed in the Fair Housing Amendments Act ("Act") (42 USC §§3601-3631). Since passage of the Act, multiple court cases have attempted to define its provisions in a land use context.

III. Defining the Issues

The Task Force devoted the first several meetings to developing an understanding of the local, state, and federal rules and regulations, as well as, the perspective of state and local officials, service providers, and neighbors. This information was compiled through discussions with the Task Force, and used to frame the land use implications within the context of existing local controls and federal guidelines.

A. Existing Regulations

Generally, residential dwellings in the City of Lincoln fit within one of three categories: single-family, two-family, or multiple-family. Each category is defined by the number of dwelling units it contains; a single-family dwelling has one dwelling unit, a two-family dwelling has two dwelling units, and a multiple-family dwelling has three or more dwelling units. Each dwelling unit is occupied by one family. The use of a structure for residential purposes, then, turns on whether the inhabitants fit within the definition of “family.” The Lincoln Municipal Code (LMC) defines family as:

One or more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit in a dwelling shall constitute a family. A family may include, in addition, not more than two persons who are unrelated for the purpose of this title. The following persons shall be considered related for the purpose of this title:

- (1) A person residing with a family for the purpose of adoption;
 - (2) Not more than six persons under nineteen years of age, residing in a foster home licensed or approved by the State of Nebraska;
 - (3) Not more than four persons nineteen years of age or older residing with a family for the purpose of receiving foster care licensed or approved by the state or its delegate;
 - (4) Any person who is living with a family at the direction of a court.
- (LMC §27.03.220)

Any number of related individuals may reside together as a family, or up to three unrelated individuals may reside together as a family. Individuals, whether disabled or not, meeting the definition of family are not subject to further land use or zoning controls. Using this definition, persons who wish to reside together are distinguished based upon familial status, or relationships. Persons who are unrelated cannot live together as a family in excess of 3 individuals.

Within the category of unrelated individuals, certain people are afforded some relief from numerical limits on occupancy. Anyone who fits within the definition of group home may apply for a permit allowing up to fifteen unrelated persons to reside together. This requires, first, they meet the definition of group home; and second, they meet the conditions of the permit. A group home is defined as follows:

Group home shall mean a facility in which more than two but less than sixteen persons who are unrelated by blood, marriage, or adoption reside while receiving therapy or counseling, but not nursing care, for any of the purposes listed below. Such facility shall be licensed or approved by the State of Nebraska or other appropriate agency.

- (a) Adaptation to living with, or rehabilitation from, the handicaps of physical disability;
- (b) Adaptation to living with, or rehabilitation from, the handicaps of emotional or mental disorder, or mental retardation;

- (c) Rehabilitation from the effects of drug or alcohol abuse;
 - (d) Supervision while under a program of alternatives to imprisonment, including but not limited to pre-release, work-release, and probationary programs.
- (LMC §27.03.300)

Group homes are permitted in all residential districts through a conditional use permit. This administrative permit is issued by the Building and Safety Department. There are three general conditions, two of which are the same in all residential districts. These two conditions combine to require the facility to comply with all other applicable zoning and sign requirements, and maintain a current state license. The third condition requires group homes to maintain a separation from one another. The required distance is either one-half mile or 1,200 feet, depending on the district. There is no discretion or public participation in the process. Once an applicant meets the conditions, a permit is issued.

Facilities for sixteen or more residents are allowed by special permit as a health care facility, which is allowed in all residential districts, and some commercial districts. The definition and permit process for a health care facility generally target hospital-type service settings, such as nursing care. The public is involved through public hearings, before both the Planning Commission and City Council. Since there are sixteen or more residents, these facilities do not meet the definition of group home.

When the occupancy of a residence changes from single-family to group home, building code requirements may stipulate changes to the dwelling. The Building and Safety Department inspects structures for compliance with adopted building and safety standards. The International Building Code is a city-adopted guideline for building construction, enforced by the city as part of the Lincoln Municipal Code.. The Life Safety Code is a state regulation enforced by the State Fire Marshal; when the Building and Safety Department enforces the Life Safety Code, they do so as the local enforcement agent for the state.

The Life Safety Code treats a group home residence with four or more occupants as a “board and care” facility, and places further restrictions on the use. Such restrictions may include greater floor separations, stair separations that include fire-rated wall coverings and doors, and commercial fire sprinkler systems.

B. State Regulation of Group Homes

The State of Nebraska regulates group home facilities through a complex set of state and federal regulations. Constitutional, federal, and state law currently place limits on the state’s authority over group homes and the right of residents to choose to live in a particular group home. In the absence of a commitment order, the selection of residence location is usually the choice of the resident or resident’s legal representative. The owner of the residence also has the right to accept or refuse to accept the resident.

The state has important oversight authority over the operation of some kinds of group homes. Their authority can vary depending upon whether or not a person is receiving services under a state program and whether the services are provided under a developmental disabilities program or a behavioral health program. The state’s authority is exercised through a combination of state licensure laws, state-operated program regulations, federal Medicaid regulations, and funding

through provider contracts. There are some individuals and some group homes over which the state has no authority.

Other governmental entities also have some oversight authority relating to individual group homes, including mental health boards, county attorneys, regional behavioral health authorities, and municipal governments. All governmental entities need to collaborate with one another to exercise their oversight authority in a manner consistent with the best interests of the group home residents and the rest of the community.

The behavioral health reform law enacted in 2004 will have an impact on some group homes, both in terms of the number of people living in community settings and additional resources being available to provide services for these residents. Although not all group homes have a connection to behavioral health reform, the recommendations provided in this report should be addressed as part of the behavioral health reform oversight process.

The State of Nebraska, through the Department of Health and Human Services (DHHS), regulates a broad category of services under the term Health Care Facility. The DHHS term “health care facility” includes centers for the developmentally disabled, mental health centers, assisted living facilities, substance abuse treatment centers, and intermediate care facilities for the mentally retarded. Each category of health care facility has its own set of rules and regulations, as well as requirements for licensure or certification.

One difficulty in discussing group homes in the context of local control versus state licensing requirements is the difference in terminology. The multiple terms used by the state are derived in part from the different service needs of different populations, and also from the different treatment and rights of each population in case law. However, the city historically has defined the list of state facilities under the umbrella term “group home.”

The differences in state treatment and regulation of “health care facilities” has little to do with the local characterization of all facility types as “group homes.” From a land use perspective, they all share essentially the same characteristic, i.e. they are residential facilities.

C. The Backdrop of the Fair Housing Act

Congress passed the Fair Housing Act as part of the Civil Rights Act of 1968. In 1988, Congress expanded coverage of the Fair Housing Act to include handicapped persons through the Fair Housing Amendments Act (“Act”) (both are codified at 42 U.S.C. §§3601-3631).

The Act was enacted to address discrimination in the sale or rental of housing. Section 3604 of the Act makes it unlawful:

- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
- (f) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap...or...to discriminate against any person in the terms, conditions, or privileges of sale

or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap...

Section 3602 of the Act defines “handicap” as:

- (a) a physical or mental impairment which substantially limits one or more of [a] person’s major life activities,
- (b) a record of having such an impairment, or
- (c) being regarded as having such impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Within the scope of § 3604(f), handicap relates not only to the person seeking the sale or rental, but also to any person residing in or intending to reside in the dwelling once it is available (§3604(f)(2)(B)), or any person associated with that person (§3604(f)(2)(C)). However, a person is not disabled for purposes of the Act *solely* on the basis of having been adjudicated a juvenile delinquent, having a criminal record, or being a sex offender.

Discrimination, as it applies to municipalities, is defined by §3604(f)(3)(B) of the Act to include:

a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

Relative to local land use controls, §3615 also provides:

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State,...but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

Additionally, §3607 states:

- (b)(1) Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons.

As used in the Act, “family” is defined only to include a single individual; and “familial status” means one or more individuals (who have not attained the age of 18 years) domiciled with a parent, person with legal custody, or designee of a parent or legal custodian.

Taken together, these provisions prohibit discrimination by or a discriminatory effect of local zoning and land use controls, as applied to persons meeting the Act’s definition of “disability.” According to the *Joint Statement of the Department of Justice and the Department of Housing and Urban Development* (“Joint Statement”), it is unlawful under the Act to:

- Utilize land use policies or action that treat groups of persons with disabilities less favorably than groups of non-disabled persons.

- Take action against, or deny a permit, for a home because of the disability of individuals who live or would live there.
- Refuse to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

The Joint Statement also states that making a determination of whether a request is reasonable must be done on a case-by-case basis; all requests for accommodations are not reasonable. According to the Joint Statement, “if a requested modification imposes an undue financial or administrative burden on a local government, or if a modification creates a fundamental alteration in a local government’s land use and zoning scheme, it is not a “reasonable” accommodation.”

IV. Local Providers: Common Concerns and Perceptions

The Task Force invited local service providers to share their concerns and experiences of using the existing regulatory strategy. Representatives from seven providers accepted the invitation. The number and types of concerns varied depending upon provider and level of services provided.

- **The process for determining if a particular property meets the zoning and building code requirements takes too long.** Providers want to find out if a property meets the spacing requirement quickly, so they know whether it will work for their use. Once a property does, the provider wants to have building code inspections done quickly to determine the scope of necessary improvements. Providers assert the time required to complete the inspections can result in the property being taken off the market and delays the opening of a new group home site.
- **Requiring a group home to make commercial type improvements is unfair when any other family is not required to make similar improvements.** The cost to make required improvements is too high. Often, the provider will lease their residences rather than own them. The property owner is generally unwilling to accept the cost of making the improvements, so providers are caught having to pay for improvements to property they do not own. These improvements are unfair when a home for eight related people is not required to make the same changes as a group home for four unrelated people.
- **Enforcement of building and life safety code requirements has not always been consistent.** A provider gave an example of one property found to meet the requirements, only to have been found out of compliance after a subsequent visit within three months. The providers point to claims of different inspectors applying the same regulations with different results.
- **There is not one City official or office to whom providers can come for assistance with all issues.** Even though several city departments may be involved with different aspects of a group home facility, providers would like a single point of contact for their inquiries.
- **There is no process for providers to request a reasonable accommodation under the Fair Housing Act.** Providers contend the only options available are to seek a variance from

the Board of Zoning Appeals or request the City Council to amend the permit requirements. They state these options are too complex and do not provide an adequate remedy, and do not provide the amount of discretion appropriate to their request.

- **The amount of funding available for the services provided is inadequate.** Providers identified two revenue sources: services and lodging. They assert the funding for lodging is insufficient to cover room and board expenses. They blame a lack of sufficient overall funding for causing high staff turnover and leading them to put more occupants in each facility.
- **The State does not always provide enough information about a resident's past disruptive behaviors.** Providing services to residents with high needs can be emotionally and physically difficult. Periodically, providers find themselves housing a person who is too disruptive for their placement. More complete information from the state would help them determine if they should accept a particular resident for placement.
- **The definition of family should allow 4 or 5 handicapped residents per facility.** This would treat handicapped persons more like a traditional family, and lower service costs by removing some regulation. State funding does not support operating a home for only 3 residents. Providers also state a higher occupancy limit will increase staff efficiency.

V. Neighbors: Common Concerns and Perceptions

The Task Force also invited neighborhood representatives to share their experiences living near group home facilities. Several individuals shared information with Planning Department staff outside of the meetings, and several persons attended meetings on different dates.

- **Residents of group home facilities are disruptive and do not care for the neighbor or neighborhood concerns.** Examples were given of residents causing disturbances late at night, damaging personal property, and being aggressive towards each other, their staff, and neighbors. They are concerned for their children's safety and the number of police responses. Providers should exercise greater control over their residents.
- **Group home facilities are not maintained as well as other homes in the area.** Staff appear to do little maintenance around the homes, and damage caused by residents may go unrepaired for long periods of time. Neighbors want group homes that are not identifiable from other homes on the block.
- **Neighbors are not notified when a group home plans to open a facility, or are notified after a facility opens.** The neighbors are taken by surprise when they find out a group home has located nearby. They want prior notice and an opportunity to address the proposal before the city approves the location.
- **Some neighborhoods get more than their fair share of facilities.** While they recognize economics and housing costs play a role in siting a facility, they want them spread over the whole city rather than congregated into several specific neighborhoods.
- **When problems occur at a group home, neighbors do not know who to contact.** Neighbors contend providers are difficult to contact and unresponsive to their concerns.

They would like to contact someone representing the provider and know the person can and will address the issue. The neighbors want to be able to contact HHS directly.

- **The Lincoln Police Department responds to group homes too frequently.** Neighbors feel police respond to occurrences at group homes more frequently than other homes in the neighborhood. Providers should be required to better manage incidents at their facilities.

VI. Task Force Findings and Recommendations

Once the Task Force had defined the underlying issues and concerns, a list of findings was prepared to guide the development of recommendations. Since there are two main licensing authorities, the Task Force has presented findings and recommendations for the City of Lincoln and the State of Nebraska. However, while the recommendations to the City of Lincoln identify general concepts as well as detailed changes, recommendations to the State of Nebraska are presented only as general concepts and observations.

The charge to the Task Force was to look at existing land use controls and their use in regulating group homes. However, the Task Force has concluded zoning is a relatively blunt tool for addressing the details of a specific land use. The concerns and issues shared with the Task Force cannot be adequately addressed through land use controls alone. Therefore, the Task Force has provided recommendations that do not address zoning regulations, but attempt to improve the overall administration of group home services within the community.

The city and state are involved in the process of regulating group home facilities together. Although each has its own set of regulations, they combine to enforce broad public policies and promote the public interest. A facility exceeding the occupancy allowed as a family is unable to operate without approval from both authorities. The city and state should approach this regulatory task in partnership, collaborating to define the most appropriate regulatory strategy.

A. City of Lincoln

This Mayor's Task Force primarily was created to review and recommend updates to existing City laws and regulations governing group homes and their placement within the city. The primary tool used to regulate group homes by the City of Lincoln is the zoning ordinance. Recognizing there are limitations within the framework of zoning, the Task Force recommendations enhance the existing zoning strategy and provide additional flexibility for case-by-case review, while also addressing the relationship between provider, resident, neighbor, and city official.

The Task Force believes the City should develop a regulation to provide a reasonable accommodation process. The Task Force also has identified definitions which should be revised for clarity and continuity. However, Lincoln's general regulatory strategy provides clearly defined land use regulations for group homes. Three processes are used to address three different occupancy limitations within the homes, while maintaining the character of the neighborhood surrounding the site. The current regulatory strategy should be retained as much as possible.

- **The definition of "family" should be revised to specifically address persons who are disabled.** The City definition of "family" is similar to the definition used by municipalities across the country. Lincoln distinguishes families from non-families based upon familial relationship, i.e. the residents must be related. When residents of a dwelling are related,

there is no limit to the number of occupants. Where unrelated persons reside together, they are limited to three occupants. Exceptions do exist for up to six unrelated individuals in certain apartments and for group homes. The apartment special permit was designed to accommodate students, and ties maximum occupancy to lot area. A group home for three to fifteen residents is allowed by conditional use permit in any residential district. Both permit types require compliance with certain conditions, but only special permits require public participation.

The Task Force believes the underlying premise for this definition of family is to afford some protections to traditional families, i.e. persons who are related. This definition of family addresses the majority of residential situations and should be retained. The requirement that group homes for four or more residents obtain city approval is consistent with Department of Health and Human Services and State Fire Marshal regulations. The protects the general health, safety, and welfare of the public by ensuring a facility complies with required state regulations.

The Task Force recommends adding a new provision to the definition of family stating a residence for up to three unrelated persons with disabilities, along with their non-resident support staff, are defined as a family.

- **The definition of “group home” should be revised.** A group home defines a group of three to fifteen persons who reside together while receiving therapy or counseling for any of several reasons. This is inconsistent with the definition of family, which would allow three unrelated disabled persons to reside together by right. This definition should be revised to remove any overlap with the definition of family.

Additionally, requiring residents to receive therapy or counseling should be deleted, and the requirement for state licensure should be revised to apply only when necessary. Simply, group homes should apply to persons not meeting the definition of family, but who are disabled, regardless of their counseling needs. This change will align with the Act more closely, as well as ensure all persons protected by the Act meet the definition. However, this revision would mean persons residing together as an alternative to imprisonment no longer meet the definition. The Task Force also finds there is no current regulation for children’s homes, whether emergency shelters or long-term residential placements, outside of foster care environments. The Task Force recommends a definition or code section be created to address these land uses.

- **The term “disabled” must be defined.** The definition of this term should be consistent with the definition used in the FHA.
- **Group homes for four to fifteen should continue to be allowed by conditional use permit in any district allowing residential uses; the conditions for group homes should remain the same; and group homes for sixteen or more residents should continue to be allowed under the current special permit procedures.** The existing strategy for addressing group home uses is effective and efficient. Coupled with additional changes addressed herein, this process provides opportunities for group homes to locate in any area of the City. The conditions may be waived through the implementation of a “reasonable accommodation” process.

Group homes are currently required to meet all other zoning regulations, and maintain a valid state license. Group homes are also required to separate themselves from one another. The Task Force believes spacing benefits group home residents. The goal of providers and state regulators is to transition the disabled population from institutional settings to community-based facilities. The apparent intent is to provide a quality of life experience as similar to mainstream society as possible. Therefore, although concentrating facilities may serve the economic and efficiency interests of providers, it does not serve the goal of providing a traditional residential setting for the residents. The Task Force determined the economic benefits to paid providers achieved by clustering group homes do not outweigh the benefits of providing a traditional residential environment.

The Task Force recommends requiring state licenses only when applicable since the state has the ability to change their requirements from time to time. The Task Force also recommends a definition for dangerous residents, be adopted once the State has developed a definition and assessment process to identify these individuals. Once defined, facilities for dangerous residents should be required to maintain separation from other congregate facilities serving potentially vulnerable populations.

- **The City should streamline the process for reviewing and issuing a conditional use permit for group homes. Applicants for group home permits should have a process for identifying whether a particular address meets the separation requirement without having to apply for a conditional use permit.** Although the conditional use permit process is administrative, it contains several activities. The most time-consuming involve inspections for compliance with building and fire safety codes. However, the time involved inspecting group homes is no greater than the time taken for other residential inspections. Even so, providers should be told in a timely manner whether a specific residence meets the spacing requirement.
- **A process to request a reasonable accommodation under the Fair Housing Act is necessary. The request must be necessary and reasonable, and an accommodation should run with the applicant. The City Council should have final authority, with recommendation from the appropriate reviewing authority. The public should be notified as under the current process.** A reasonable accommodation process is necessary to allow group home providers the opportunity to request waivers to specific regulations, and give the City the flexibility to review requests on a case-by-case basis.

Requests for reasonable accommodation may stem from any number of existing regulations or unforeseen resident needs. The process should provide a review by the appropriate body having jurisdiction over the subject matter, and be acted upon by the City Council.

Applicants seeking an accommodation should demonstrate the necessity of the request, including reasons why an alternative solution is not possible. In addition, the request must be reasonable. The Department of Justice and HUD suggest a two-part test for reasonableness. First, the request should not impose an undue financial or administrative burden on the local government. Second, the request should not create or require a fundamental alteration in the land use and zoning scheme of the local government.

- **The City should encourage providers to accept the responsibility to meet with neighbors to inform them of proposed occupancies and address concerns.** While not

a legal requirement, providers should visit with their neighbors outside of the permit and waiver processes. Neighbors frequently direct their concerns to local officials. Providers should assume the responsibility of addressing concerns raised regarding their facilities.

B. State of Nebraska

The following points are included as general observations without detailed suggestions for implementation. The Task Force feels it is properly the State's role to determine if and how any of the points are incorporated into their overall system. The Task Force also recognizes the behavioral health reform law will have an impact on the regulation of group homes, an impact that may ultimately address one or more of these points. In addition, the state's authority is quite broad, and applies to different populations in different ways. Therefore, some of the points below may apply to one population and not another.

- **DHHS staff and resources are inadequate to provide the oversight necessary to ensure regulatory compliance.**
- **Additional and better training programs are needed to address perceived weaknesses in provider competency. Programs should address minimum pre-employment training, continuing education, and certification of curricula.**
- **The behavioral health services system should address the perception that local law enforcement is relied upon to perform duties outside the scope of its authority.**
- **A process to identify persons who are or may be dangerous to themselves or others must be developed. An appropriate environment must be provided for these persons to address their specific service needs.**
- **Persons who present high behavioral needs, but are not dangerous, should be identified and placed in facilities providing an appropriate level of care.**
- **All incidents at a facility must be reported to DHHS. Local law enforcement and building officials can provide information to identify facilities which have the potential to become problematic.**
- **A group home advisory committee should be used to identify and address public concerns and perceptions of group home facilities.**

VII. Conclusion

The Task Force believes the general regulatory strategy used by the City of Lincoln is appropriate and works most of the time. There are instances where additional flexibility should be available, and a process needs to be developed to address those instances. Additional minor revisions will address existing inconsistencies between the definitions of family and group home.

The State of Nebraska has a role to play in the regulation of group homes as well. While the Task Force has primarily focused on land use tools, there are issues of compatibility that are most appropriately addressed through state regulations rather than local land use controls. The Task Force has identified those points with the intention of joining the state in an ongoing partnership to address common issues relating to group homes.